In many respects the mail service required differs from that connected with any other. For example, the service must be furnished on demand and must be given preference over any other service performed by railroad passenger trains; and extraordinary care and attention must be given to speed and connections with other trains under penalty of a fine for failure to deliver. These distinguishing features and others that might be mentioned indicate that in some respects the conditions of service are more exacting and burdensome than conditions with respect to other services in passenger trains. * * * " (Railway Mail Pay, 56 I.C.C. 1, 46).

(3) The point that 3-foot closed pouch were used to something less than the possible maximum has already been dealt with herein preceding at page 71, and as there shown has no merit. After considering the same contentions the lower Court, on the evidence as a whole, said:

> "The Commission has by its findings, using its adopted plan, and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid $186,707.06, in fair and reasonable compensation for the period in question. (See Finding 23).

That those "factors", like others, were, obviously, mere talk, thrown in to give some appearance of plausibility to the fact that the Commission's action was purely arbitrary is manifest in the fact that the Post Office Department freely admitted the plaintiff was underpaid; that the defendant now concedes as much in its brief; and the special findings of fact by the Court of Claims were unchallenged. Plaintiff respectfully submits that the fact the Commission applied a procrusean rule desired by the Post Office Department for which it also had an administrative predilection in disregard of the evidence is not excused by reasons which after two courts had found too lame. Yet they are again urged by the defendant. Plainly the Commission should have given effect to a cost study which "took into account

all the considerations that might fairly be brought forward and reasonably be given consideration (*Olson v. United States*, 292 U.S. 246, 257); and which, in the opinion of a three judge District Court was "the fairest method that has been devised." (Appendix B, p. 65).

At page 10 the defendant clearly reveals the real reason for the Commission's disregard of the result of the cost study, in favor of a rule of administrative convenience desired by the Post Office Department when it says:

> "* * * and in view of the fact that the applicant receives the same rates as those received by other roads for the same kind of service, many of these other roads being in much the same situation as the applicant in respect of passenger-train operations, "the data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service."

In the first place, all that this Commission's "reason" meant was that there are other lines with which this plaintiff has been arbitrarily classed which are paid the same rates per mile per unit, and as they are suffering likewise, the plaintiff will have to continue to do so.

Respecting this proposition the lower Court said:

> "The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be the individual carrier, for otherwise the term 'compensation' is meaningless * * *. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit. The rates authorized by the Commission were based on a grouping together and then given particular application without change. It did not follow that rates, fair and reasonable for an average road (which in fact did not exist), would be fair and reasonable for all existing roads."

* * * * *

"There is no presumption that the average is typical of the particular. The presumption is otherwise, and the plaintiffs, having shown their railroad to be in a comparatively low scale, and thus distant from the average, had no great burden of proof before them in presenting their case to the Commission. It was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid $186,707.06, in fair and reasonable compensation for the period in question. See Finding 23.

"If that which the Commission determined is fair and reasonable compensation for the representative road, it must, we think, be fair and reasonable for any one road that is so represented. The reasons given by the Commission for not ordering payment on the basis of its findings, of the annual sums making up the above total of $186,707.06 are not convincing or even persuasive. In our opinion, they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just." (R. 48).

In the second place, however, even though to many other roads the same low schedules of pay have been applied, there are many others who operate the same size units of service to whom much higher schedules are applied, some as high as 37½ cents per mile for 15 foot R.P.O. service.*

* For the "same kind of service," viz., 15 foot R. P. O. apartments, in the second general *Mail Pay Case*, 144 I. C. C. 655, 718, the Commission prescribed 19½ cents for New England Trunk lines over 100 miles in length; 27 cents for lines under 100, but over 50 miles, and 34 cents for lines under 50 miles. In the *Intermountain and Pacific Coast Lines cases*, 96 I. C. C. 493 and 151 I. C. C. 734, rates prescribed for lines over 100 miles, 25 cents; under 100 but over 50 miles, 30 cents; under 50 miles, 37½ cents. For the *Alabama, Tenn. & Nor. R. R.*, 112 I. C. C. 151, 186 miles, 25 cents.

On page 11 the defendant refers to another of the Commission's "factors" and makes the statement that "the total unused space allocated to passenger, baggage, express and mail service constituted 44 percent of the total space operated for these services", as though that fact had some special point. To put it another way, and correctly, the mail, express and baggage used only 56% of the space in the one car they used together. The Commission did not say that 44 unused was excessive, nor was that fact coupled with any claim that it had any real significance. If the defendant intended to cast any slur at the efficiency with which the Georgia & Florida was operated it should be sufficient to quote the following statement by the lower Court.

> "Here, however, it is found that "there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such sots were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs." (R. 43).

It is perfectly obvious from the record that the Georgia & Florida is a line of very light traffic density, which the record shows is one of the predominant characteristics which it has in common with short lines of less than one hundred miles. The very much lighter loading of passenger cars is one of the marked differences between the great "mass production" low unit cost systems like the Pennsylvania on the one hand, and the short lines such as the Georgia & Florida on the other. (Trans. in No. 63 (1937) p. 289). The Commission for that same basic reason gave effect to this difference in prescribing higher compensation for short lines under 100 miles where it could do so on a group basis within the boundaries of its classification scheme; and should have done the same thing for the plaintiff, on the merits of its individual facts, instead of giving effect instead to the desire of the Post Master General to keep a rule of average unimpaired.

On page 11 the defendant repetitiously states that (1) "the Commission also found that 'another element of doubt, as to the reliability of the space study as the basis for determining the cost of service, arises from treating the 3-foot units of authorized mail space as the full space used by mail, regardless of the load carried' "; also that "the Commission mentioned that the space furnished to meet authorizations for 3 ft. units is not set aside for exclusive use but is merely available space in the same car used to carry baggage and express"; and (2) that "in fact, according to the Commission's statistics, considerably less than half the amount of space authorized appears to have been used".

These propositions have already been dealt with (1) at pages 71, 76, 78, *supra*, and the other at (2) page 81, *supra*; and reference is made thereto to avoid repetition.

On page 12 the defendant states:

> "Further casting doubt on the cost analysis, the Commission notes that its computations did not take into account the fact that 'expense of transporting mail per authorized car-foot mile, in view of the service rendered by applicant on its trains in connection with it, might reasonably be considered to be somewhat less per car-foot miles than for passenger-train service as a whole'."

There being no evidence to warrant the Commission's assertion it was nothing more than a gratuitous slur made and now repeated merely for the purpose of, as the defendant expresses it, "further casting doubt on the cost analysis".

In any event it will be interesting to contrast this slur with what the Commission said, in a calmer moment, in the first general mail pay case when the Post Office Department had urged that rates should be imposed which would be less

than would be compensatory. The Commission, in firmly rejecting such a proposition at that time said, inter alia:

> "In many respects the mail service required differs from that connected with any other. For example, the service must be furnished on demand and must be given preference over any other service performed by railroad passenger trains; and extraordinary care and attention must be given to speed and connections with other trains under penalty of a fine for failure to deliver. These distinguishing features and others that might be mentioned indicate that in some respects the conditions of service are more exact and burdensome than conditions with respect to other services in passenger trains." (56 I.C.C. 1).

On page 12 the defendant repetitiously states that:

> "The Commission also compared the revenue respondents received from the mail service with revenue received for other services and found they were receiving per car-foot mile approximately six times as much revenue from mail traffic as from passenger traffic and approximately two and one-half times as much revenue from mail traffic as from express traffic".

This proposition has already been dealt with at page 76, *supra*, and reference is made thereto to avoid repetition.

On page 12 the defendant also states that the Commission computed the average expense per car-foot mile of operating the passenger train service and compared this figure with the revenue received for authorized mail space, and the average computed expense per car-foot mile for passenger train service as a whole was .66 cent; and that the revenue per car foot mile of authorized mail service was 1.03 cents, or 56 per cent more than the average computed expense. Thus, "revenue per car foot mile from the authorized space approaches quite closely the hypothetical

cost per car-foot mile plus the stated return for mail service." It goes on to admit that "this computation does not include, of course, any distribution of mail revenue to unused space apportioned to mail."

The defendant fails to point out wherein it considers this computation has any relevance or materiality. It merely represents it only as a factor upon which the Commission relied; and it goes on to admit that this computation does not include, *of course*, any distribution of mail revenue to unused space apportioned to mail, as such it was merely a delusory mathematical exercise. By a similar, mathematical exercise it could be just as uselessly computed that by using one linear foot of car-space per passenger, that if a train ran filled to capacity with passengers, the railroad would receive 2.8903 cents per car-foot miles for the transportation of each passenger, as compared with only 1.0297 cents per mile for requisitioned mail service (Trans. in No. 63 f. 206.354).

From the foregoing examples it is manifest that the various reasons given by the Commission as the "factors" or "circumstances" on which it relied to excuse its disregard of the results of the cost study, are without merit; and do not impair the soundness and accuracy of the cost study as a close approximation of the actual costs. The truth of the matter that the Commission, like Procrustes, was bent upon applying a arbitrary rigid rule of classification desired by the Post Office Department. Of its attempted justification therefore the Court below said:

> "The Commission's decision of May 10, 1933, 192 I.C.C. 779, states its position with reference to plaintiff's claim as follows:
>
> "The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See Railway Mail Pay, supra. The comparison of mail revenue with

other revenue received for services in passenger-train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand many are in much the same situation as the applicant in respect of passenger-train operations. The data submitted fails to justify giving the applicant rates higher than those now paid other railway common carriers for like service."

"We quote rather than paraphrase this, for what it says is important. We are of the opinion that the "approximation" should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. Approximate, or as it is called, "computed" cost must be relied upon, and as a matter of law must be decisive. There is no alternative or at least no satisfying alternative. Of course there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2. And it did not, in the decision of May 10, 1933, abandon Plan No. 2 and select another.

The fact that the plaintiffs' railroad "receives the same rates as those received by other roads for the same kind of service," is not responsive to the plea that those rates, as to the plaintiffs, are confiscatory. The service is compulsory, economy and efficiency of operation are undisputed. This is not a case where the carrier may cut down its expenses and thus convert the remuneration into one that is fair and reasonable. It has already reached the efficient and economical stage, and if it must carry the mail, the remuneration must fit that situation. Here it has not done so."

The four judges of the Court of Claims were not alone in this view. The opinions of three other judges in the District Court were to the same effect; and, for ready ref-

erence one paragraph from their second decree and opinion is quoted:

> "Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed 'to ascertain and compute the proportions of operating expense and the separations into expense for freight service and passenger service respectively, but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned in accordance with the formulas prescribed for Class I roads for the separation of expenses between freight and passenger service." (Appendix B, p. 66).

With respect to other evidence adduced before the Commissioner for the Court of Claims, the following is to be said:

On page 14 the defendant represents that in *September, 1937*, the Post Office Department had initiated a study to determine on what routes mail, being carried on mixed freight and passenger trains, could be diverted to other mail or highway routes (R. 103, 104, 171); that in June, *1939*, the Division Superintendent of railway mail service had recommended discontinuance of the 15-foot apartment service on the plaintiff's line between Douglas and Valdosta, Georgia, with the substitution of closed pouch service, which would save the Department $4,870.56 per year (R. 106, 177); but that as a result of the protest against eliminating the financial benefit to the plaintiff, the Department determined not to discontinue the route until the railroad voluntarily curtailed its service (R. 192).

Without more facts these representations are misleading. Witness Hardy testified that he did not become General Superintendent of Railway Mail Service until May 1, 1939 (R. 129); that shortly thereafter, May 1, 1939 (R. 99, R. 129), a recommendation was made by the field officials for some curtailment "*as an economy* proposition only",

but that "the Department received a number of petitions and protests from the patrons along the line" * * * and that "probably the determining factor in my decision was the fact that the railroad company pleaded that we continue the service because of the financial benefits * * * " (R. 99, 100). He later admitted that in all such cases the controlling and primary consideration was the public convenience and necessity (R. 100, 133, 145).

All of the following exhibits were clearly irrelevant, for the purpose offered but nevertheless tend to rebut Witness Hardy's testimony:

Defendant's Exhibit 7 was a copy of letter dated October 10, 1938 from the Chief Clerk of the Railway Mail Service to the Superintendent of Transportation of the Georgia & Florida Railroad to the effect that an investigation was being made as to the comparative costs of rail service compared to motor car or star route service on the Augusta & Madison Railroad post office between Augusta and Valdosta. It disturbingly inquired if the loss of mail pay would seriously affect the finances of the railroad if the service was eliminated, and if the train service was eliminated or discontinued would the communities involved be discommoded or affected adversely by the loss of railroad service (R. 169).

Defense Exhibit 8 was copy of a reply dated October 25, 1938, and was the answer in the affirmative, to the effect that such a change would seriously affect the finances of the railroad, and would undoubtedly curtail train service or eliminate passenger train service entirely; and that the result would be serious or disastrous to the communities affected (R. 169).

Defense Exhibit 9 (R. 171) consisted of a detailed report by the Chief Clerk of District 8 and the acting Superintendent of Railway Mail service to the General Superintendent dated June 21, 1938, with certain sup-

porting documents, in which it is set out that when in the preceding fall, consideration was given to discontinuing all railway post office service between Augusta and Valdosta, not only was there vigorous objection from the public, but that it was not practicable to cover the service by Star Route as the roads are not passable the year around; and there was a sufficient quantity of mail handled between Augusta and Douglas to justify railroad post office service; and the only discontinuance recommended was between Douglas and Valdosta.

Defendant's Exhibit 24 showed that the proposed discontinuance was expressly limited to "an economy proposition only". As such it was disapproved, along with a proposal to discontinue closed pouch service between Valdosta and Madison.

Defendant's Exhibits 7, 8, and 9 were objected to as irrelevant and immaterial because it related only to a period subsequent to the period of the plaintiff's claim. Ruling was reserved until the defense had an opportunity to present further evidence to connect it up as evidence "as to the importance and value of the route" (R. 104). The record does not indicate that any such connection was ever established that would make said exhibits relevant or material.

The only testimony relevant in point of time was Defendant's Exhibit 23 consisting of copies of railway Post Office inspection reports dated April 7 and 8, 1932, June 7 and 8, 1934, March 14 and 15, 1935, and April 7 and 8, 1937, and perhaps were intended to connect up with Defendant's exhibits 7, 8 and 9.

However, there is nothing in these reports to indicate that anybody had any idea for economy reasons, or otherwise, at time thereof that any part of the service could or should be discontinued. To the contrary, the 1935 and 1937 reports expressly state on their face that service with clerk was justified. The 1937 report on train 4 states "service with clerk justified every day in the week except Sunday. No saving is possible as space and clerk is necessary on that day in train". (R. 181).

With respect to this line of testimony the following is to be said:

First: there was no testimony to indicate that the Post Office Department had any authority to grant subsidies to carriers on the ground that they were insolvent, and no witness professed to have acted upon any such theory.

Second: the mere fact that sometime in 1937 the Post Office Department had, *in general*, begun to make studies to determine on what routes throughout the country mail carried on mixed trains could be diverted is irrelevant since it did not appear to have done so at that time on the line of the plaintiff.

Third: all the testimony relating to anything which occurred after February 28, 1938, and that was most of it, was obviously immaterial; and even if it was it will be noted that in the exchange of correspondence between the Railway Mail Service and the carrier, nothing was said about the applicable rates then or for the future. The Post Office Department well knew at that time that as well as before the rates currently being paid were unsatisfactory, and proceedings were then still in progress to obtain additional compensation. The only presumption warranted by the facts was that the carrier would continue to seek just compensation, and that the Post Office Department con-

tinued to route with the probability fully in mind that the compensation would be enlarged.

Fourth: the only evidence which was relevant showed that the period of this claim went to show that there was no question but that the service was justified and was continued on its merits, and not as a matter of indirect subsidy to a needy carrier.

Fifth: Whether intended as a veiled threat or not the Post Office Department's inquiry (Defense Exhibit 9) plaintiff deterred from filing its suit more promptly; and explains why it was limited to period ending Feb. 28, 1938.

On page 14 the defendant states "at no time did the plaintiff ever ask to be relieved of the burden of carrying mail" (R. 97). Since the service was taken under authority of law this point is simply irrelevant and immaterial. It is interesting, however, as indicating the lengths to which the defendant feels it needs to strain.

On page 14 the defendant represents that "the Government introduced evidence to prove that between 1931 and 1938, every point of significance on the Georgia & Florida's mail routes was also served by another mail carrier, both by intersecting railroad lines connecting such points directly with Atlanta, Savannah, or Jacksonville, which are the three metropolitan centers for the region served by respondents, and by highway routes (R. 72-89).

The petitioner knows, of course, that the entire service furnished by the respondents could not be replaced by any alternative service available during the period in question or since. That is something so self evident and of such common knowledge that the court could take judicial notice of same, but, anyhow, it was discussed on the record thus:

"Mr. Hitt: May I ask as to what point this testimony is addressed, what it is you are trying to establish that you are trying to show?

Mr. Rood: It will show alternative service available in all these points at the same rates or at cheaper rates and that in fact railroads voluntarily cut their rates below the I.C.C. rates in order to get this business, as it is so profitable to them.

The Commissioner: Do you mean that a railroad running from Savannah to Atlanta is an alternative service for one running from—

Mr. Rood: Oh, certainly.

The Commissioner: —Augusta down to—

Mr. Rood: Yes, indeed; the mail service is.

The Commissioner: You mean they take the mail all the way down by Savannah just to get a little cheaper rate?

Mr. Rood: Oh, the mail service is a complete network as is shown here.

The Commissioner: That is not answering my question. I am asking whether a particular service within—that goes back—rather, whether a roundabout service, is an alternative—as, for example, down around Savannah and back up to Augusta—is an alternative service for direct routes where there is no emergency. Of course, it could be shipped via Key West if it had to be done.

Mr. Hood: Well, all right.

By Mr. Rood:

Q. 98. Mr. Threadgill, suppose there were no Georgia & Florida Railroad mail from Montgomery, Georgia to Augusta. In that case would it be possible to move mail from Montgomery to Augusta?

A. Do you refer to Vidalia, Georgia, instead of Montgomery?

Q. 99. No, I am just talking about Montgomery. Isn't that the—

Mr. Todd: This is Montgomery County. Vidalia is what you are speaking of.

The Commissioner: The point I am getting at is this:—

Mr. Rood: Oh, I beg your pardon. I do refer to Vidalia, yes.

The Commissioner: The point I am getting at is this: You are trying to make a comparison of the value of a service around by way of Savannah with the direct service through to Augusta by the railroad here in question, on the theory, I presume, that in a suit for the value of land you possibly might be permitted to show the value of comparable land, and it is your position—

Mr. Rood: Adjacent.

The Commissioner: And it is your position, around by way of Augusta is comparable—or around by way of Savannah is comparable to the direct route to Augusta; is that it?

Mr. Rood: Strictly—

The Commissioner: Is that it?

Mr. Rood: Yes, sir.

The Commissioner: Yes. Well, I will sustain an objection on the ground that they are not comparable.

Mr. Hitt: I object, on the ground they are not comparable. Star routes are not comparable, and the alternatives by rail are not comparable.

The Commissioner: It is very doubtful. Many jurisdictions reject proof of value of comparable properties in any event, but here a sustain the objection that they are not comparable.

Mr. Rood: Yes, I except.

By Mr. Rood:

Q. 100. Mr. Threadgill, suppose you had a parcel post package going from Vidalia, which is in Montgomery County—I had those two names mixed up before, on the map here—from Vidalia to Washington, D. C. Could that move on the railway mail train to Augusta?

A. It could.

Q. 101. Could it move on the railway mail train to Savannah?

A. It could.

Q. 102. Either way?

A. It could.

Q. 103. As a matter of fact, which is the most frequent service?

A. Well, the Savannah-Montgomery R.P.O. has only one train in each direction at present. They have had

more frequent service but at present they have only one train in each direction.

Q. 104. Well, the timetable here shows a trip out of Vidalia at 5:20 p.m. Is that what you refer to?

A. That is one of the trains on the Savannah and Montgomery R.P.O.

Q. 105. And then I see a trip from Vidalia to Savannah at 7:20 a.m. What is that?

A. That is star route service.

Mr. Hitt: Mr. Commissioner, I object to this.

The Commissioner: Sustained.

Mr. Rood: Well, Your Honor, if we can't prove market value by the value of adjacent properties, we are in a bad spot here.

The Commissioner: I told you it was my view of it that they are not comparable services. At the time these trains were running the others were not comparable because they were much further around, going to different places. You have to go into the whole setup and organization of the other railroads to show if there is a comparable situation.

Mr. Rood: Well, I say, now, on a parcel post shipment from Vidalia to Washington, D. C. My witness says they can go equally either way.

The Commissioner: He just didn't say they go equally. He said he didn't ship them from one place over the route that could be shipped the other way. He didn't say there was an equal choice at the time the trains were running.

By Mr. Rood:

Q. 166. Well, Mr. Threadgill, which is a preferable route from Vidalia to Washington, D. C., for a parcel post shipment?

A. It would depend on the time the parcel is placed in the post office.

Q. 107. Do you mean to say it would go on the next train, generally speaking, as a rule?

A. Not always.

Mr. Hitt: I object to that. I don't see where that leads us anywhere.

Mr. Rood: Well, if the only difference is the trains go at different times, that is comparable.

Mr. Hitt: It is true that if a town isn't served by one line of railroad, why, the government can serve it

by another line of railroad or by a star route to get it there somehow. There are no insuperable difficulties to keep them from getting mail to a town by star route, but when it comes to these services by traveling post offices, why, they have a post office where they can assort the mail en route and distribute it as they like, going down another line of road to various and sundry towns.

Mr. Rood: My witness didn't say that the Vidalia-Savannah route is a traveling post office.

Mr. Hitt: Yes.

The Commissioner: But the other post office cannot possibly serve the towns which this one is serving. Yes, it can serve Washington, D. C., and it can carry distance between certain terminal points, but it cannot possibly serve the towns in between, and that is the reason they have got it." (R. 80 to 83).

On page 15 the defendant represents that "the Government offered to prove that the entire service involved in this action could have been adequately replaced at no increase in cost (R. 83, 96-97).

The plaintiff respectfully submits that the defendant is mistaken.

The defendant's first offer of proof was made in the following setting and form:

"Q. 109. Mr. Threadgill, now if there were no Georgia & Florida Railroad, what would the post office do to move mail from Vidalia to Washington?

Mr. Hitt: I object as being irrelevant and immaterial.

The Commissioner: Objection sustained.

By Mr. Rood:

Q. 110. What would it do to move mail to Augusta?

Mr. Hitt: I also object to that.

The Commissioner: Objection sustained.

Mr. Rood: To Augusta?

The Commissioner: Yes.

Mr. Rood: I except to the Commissioner's rulings, respectfully. Is it understood that exception is reserved?

The Commissioner: You have a right under the rules to except, you don't have to get any permission. However, if you want to gain anything by it you better make an offer of proof.

Mr. Rood: Do I have to note the exceptions each time?

The Commissioner: Yes, each time you should note it.

Mr. Rood: Yes. All-right.

I now offer to prove that, if the Georgia & Florida Railroad ran no mail trains at any time from 1931 to the present, the buyer of the mail service on that railroad (that is to say the Post Office Department) would be able to employ adequate alternatives at a financial saving, to move mail out of Vidalia to any point in America served by any other railway route or star route or R.F.D. route." (R. 83).

First, it will be noted that this first offer is limited to Vidalia alone and not to the entire service furnished by the plaintiff.

Second, it will be noted that the predicate of that offer was an assumption, contrary to the fact that "if the Georgia & Florida ran no mail trains at any time from 1931 to the present"; whereas the offer was made in the present tense, to show that now the Post Office Department "would be able to employ adequate alternatives at a financial saving * * *".

Since plaintiff's claim relates to a period to Feb. 28, 1938 what the Post Office Department might or might not now do is irrelevant and immaterial.

Third, there is an ambiguity in the word "adequate" in the sense that what might, in the absence of any other alternative, be adequate to get the same volume of mail transported between Vidalia and the rest of the world *if there was not in existence any passenger train service directly available* between Vidalia and other post office points on the line of the Georgia & Florida, would be a very different thing from what would be adequate as an alternative when service by direct passenger trains operated by the plaintiff

between Vidalia and other post office points on its line does exist.

The defendant's second offer of proof was made in the following setting and form:

(Witness Stephenson)

"Q. 42. (By Mr. Rood) Well now, on those routes that are shown in Exhibit 2, I see Atlanta and Jacksonville R.P.O. furnished by the Southern Railway, with mileage 330. Down below I see Atlanta, Valdosta and Jacksonville R.P.O. furnished by the Georgia, Florida & Southern Railway, with mileage 349. Now, do you pay for that local route a higher compensation on mail carried from Atlanta to Jacksonville?

A. We pay the shorter mileage. The company has agreed to equalize the mileage. The Central of Georgia and the Atlanta Coast Line equalizes with the Southern Railway.

Q. 43. Are there any other illustrations of equalization in Georgia?

A. The Central of Georgia equalizes with the Southern Railway between Atlanta and Macon, and the Atlantic Coast Line equalizes with Seaboard Air Line between Washington, D. C., and Jacksonville, Fla.

Q. 44. Well, now—

Mr. Hitt: May I ask, what is the object of this line of questioning? Does this go to the same thing that was excluded yesterday, that there is no comparability between these routes?

Mr. Rood: This shows that on R.P.O. service parallel railroads in the same place are willing to accept a still lower rate to get the business. The post office is under an obligation to pay the standard rates furnished by the I.C.C. Since that is so, the cheapest rate to the post office would be the short line; and lines which are longer than the short line, the cases just mentioned by Mr. Stephenson, voluntarily waive their rights to compensation for the mileage on their route which is in excess of the short line distance.

The Witness: That is for the through mail, through mail going over those lines only.

Mr. Rood: Yes.

Mr. Hitt: I appreciate what you are saying, Mr. Stephenson, and I object to the line of testimony because there is no line of comparability here with the Georgia & Florida. That is the ground of my objection.

The Commissioner: The objection is sustained.

Mr. Rood: I offer to prove that other railroads operating mail routes carrying mail through the same towns which are served by the plaintiffs' routes are so anxious to get the business that they voluntarily come to the post office and offer to accept rates lower than the rates prescribed by the Interstate Commerce Commission. They do that by, I think, waiving compensation to mileage above the short line mileage.

By Mr. Rood:

Q. 45. Is that correct, Mr. Stephenson?

A. That is right.

The Commissioner: Very well. The objection is sustained. You may make your offer of proof.

Mr. Rood: Yes. I offer to prove through this and other witnesses that—

The Commissioner: Through this witness.

Mr. Rood: Through this witness, then: That if the post office decided not to ship mail over the Georgia & Florida Railroad, but used the Star Routes exclusively, and the other railway routes which were shown to serve every stop yesterday except two, that the post office would make an annual saving not only of the amounts paid the railroad for the R.P.O. and the closed pouch service, but also all of the amounts shown in column 3 of Exhibit 6, and a large percentage between a third and a half, of the amounts shown in column 4 of Exhibit 6." (R. 95, 96, 97).

This second offer of proof merely goes to the point that it would be possible to use Star Routes and other railway routes at an annual saving, but it does not even purport to be an offer to prove that either the Star routes or the other

round-about railway routes would or could be an *adequate* substitute for direct service over the line of the plaintiff.

On page 15 the defendant represents briefly that "the evidence also established that plaintiff's receipts from mail traffic constituted net additions to its revenue" (R. 35, 113).

The respondent respectfully submits that the defendant merely put in testimony upon the apparent theory that the respondent would have no claim if it can be made to appear that the compensation for handling the mails was sufficient to pay something above the bare "out-of-pocket" costs directly attributable to the handling of mail which would not have been necessary if the railroad had been operated anyhow without mail.

If there was any validity in such a theory as a yardstick for determining mail pay compensation it should be just as good as a yardstick for determining the level of compensation to which carriers might be entitled to expect for the performance of freight and passenger services. Therefore, the respondent respectfully submits, before this theory could have a valid application, there would have to be combined with it some provision by which to bridge the gap between (1) the total cost and burden of furnishing the property and operating the railroad and (2) the mere "out-of-pocket" costs directly attributable to each kind of traffic. Otherwise this theory is in the same category as that of perpetual motion.

There are types of situations in which the ascertainment of "out-of-pocket" costs are really useful, such as where the dispute to be resolved is whether a given volume of traffic or revenue yields enough revenue to cover the "out-of-pocket" cost. This often occurs in proceedings on applications to the Interstate Commerce Commission for authority to abandon unprofitable branch lines. In such proceedings the applicant usually supports its application with figures to show *the branch* for which authority to

abandonment is sought, is losing money, while the opposition usually contends that *the parent system as a whole*, makes money on traffic originating or terminating on the branch.

In such cases the problem for the Commission is to find whether the branch is such a burden on interstate transportation that the public interest requires its abandonment; hence, it is relevant, and often of controlling importance, to know whether or not the branch contributes enough traffic for the system as a whole to earn the "out-of-pocket" cost of keeping it going.

Also, in some types of rate cases, but by no means all, definite information on "out-of-pocket" costs is often a relevant and material aid of a sound decision as to whether or not the public interest requires the granting to lines forming longer routes, relief from the prohibitions of the fourth section of the Interstate Commerce Act against charging less for a long haul than for a short one.

In any event, it does not follow that because "out-of-pocket" cost studies are useful and relevant in some types of proceedings before the Interstate Commerce Commission under the Interstate Commerce Act, that they are also useful or material or relevant in proceedings under the Railway Mail Pay Act. Nothing in the record goes to show wherein an "out-of-pocket" test would in any way be either relevant or useful or material in the present case.

On this proposition the lower Court among other things well said:

> "At a hearing on this case by a commissioner of this court February 18, 1946, a witness for the defendant, the Chief of Section, Cost Section of the Bureau of Transport Economics and Statistics, who was acknowledged in Senate Document No. 63 as especially contributing in the preparation of the cost study (therein), stated, in response to a direct question as to whether the present cost formulae were much better than the cost formulae used by the Commission in 1928 or in 1931:

"Well, in 1928 and 1931 the Commission did not have really any cost formulae. They still haven't got any cost formulae, but the Cost Section was formulated for the express purpose of determining cost formulae for that they might be used by the Commission in gathering costs and might be distributed to the carriers so they would have means and procedures for gathering those costs. * * * ". (R. 43).

* * * * *

"The 'out-of-pocket' or 'added' cost theory has been injected into the case (findings, 31-33), but we are not convinced that additional service is in any different situation than the service to which it is an addition, as far as computing fair and reasonable compensation is here concerned. We think there is just as good reason for considering express as the added service rather than the mail. The fact that a carrier is only too glad, perhaps anxious, to carry mail to help cover otherwise wasted floor space, is understandable. But that is no reason why the mail should be carried at 'bargain' rates. A passenger who goes aboard a train after the coach has already accumulated a paying load, must nevertheless, and rightly so, pay full fare, along with all the rest. *Cf. Fred R. Comb Co.* v. *United States*, 103 C. Cls. 174, 183. We do not say that the added cost or out-of-pocket theory, with its implications, is inapplicable in all cases. But the theory, if we are to believe the witnesses, has not matured into practice in the determination of mail pay." (R. 45).

* * * * *

"We cannot agree that the basis of compensation is to be governed by the added or out-of-pocket cost theory. It was not applied in Plan No. 2, as that plan is explained to us, and we cannot find that plan grossly erroneous. The plan applied to a group gave certain rates, but the rates good for the group did not fit plaintiffs' road. The plan applied to the plaintiffs' road gave higher rates than to the average road and are the only rates presented in the Commission's decisions that give the plaintiffs fair and reasonable compensation. The plaintiffs here are entitled to them. The

average road has no physical existence and the general rates put into particular effect would mean greater or less compensation for the individual carrier. But the governing statute was careful to make provision whereby the rates might not be confiscatory for any one road." (R. 47).

On page 16 the defendant represents that "relying on the Commission's finding that an increase of 87.4 percent of the rates paid would be necessary to provide compensation for costs and an adequate return on investment by a mathematical application of the cost allocation formula in Plan 2, the Court below held as a matter of law that the application of the formula was mandatory".

If the defendant meant to give the court the impression that the lower court had held that the cost allocation employed in this case had the force of law, it is respectfully submitted that it is not correct. What the lower Court truly said, inter alia, was:

"But had we the actual cost it would serve only as a guide, a cost to be considered, but not necessarily to govern, in arriving at fair and reasonable compensation. The question is, rather: what is the fair and reasonable cost? For we cannot proceed from an unfair and an unreasonable cost toward a fair and reasonable compensation.

Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs.

Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find even an intimation that the so-called "actual" cost, whatever it might be, was anything but fair and reasonable. What we do find is that, on the facts as found and stated by the Commission, there is an erroneous conclusion of law

by the Commission that plaintiffs have been fairly and reasonably compensated for their mail service". (R. 43).

* * * * *

"The so-called 'computed' cost being the only cost that can be used, it must fairly and reasonably be computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof.

Under Finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.40% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.75% theretofore fixed by the Commission on its investments in road and equipment engaged in mail traffic. This determination was based on the calendar year 1931 test period. The Commission's findings were determined upon an apportionment of passenger equipment used for mail traffic on the basis of space hired or required for carrying the mail.

Railroad expenses are not generally applicable as direct costs but require apportionments. The Commission did not, under Plan 2, which it adopted and which we must accept, determine actual costs of various operations." (R. 43, 44).

* * * * *

"In view of the record presented the basis employed by the Interstate Commerce Commission, that is to say Plan No. 2, appears to be fair and reasonable. The

studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting.

The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the Government and used by the Commission to prescribe rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis. The Commission, by its use of Plan No. 2, has adjudged it to be a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, what is the fair and reasonable compensation for plaintiffs' carriage of the mails beginning the first of April 1931, and ending at the close of February, 1938. Fair and reasonable compensation cannot be both a deficit and the amount of $186,707.06 so found. It is, we conclude, the latter." (R. 46).

On page 11, and again on page 60, the defendant asserts that in other mail pay proceedings "consideration" had been given to other factors besides the cost study. An unspecified claim that "consideration" has been given is a highly ambiguous statement which, as in this case, usually means little or nothing. For example: one of the "factors" which it is alleged that the Commission considered in other cases was "the actual space occupied by mail, as distinguished from authorized space"; but it is impossible to determine from a close reading of the reports in the three cases cited that any weight whatever was given such a "factor," as the following demonstrates:

Intermountain and Pacific Coast Short Lines case: in 95 I.C.C. 493 (in which an increase of 100 per cent was awarded) one of the contentions those carriers made, with substantiating proof, was that the size of packages and parcels in that territory are larger than the national average. The Post Office Department, however, cited instances in which the amount of mail carried was not sufficient to fill the authorized unit (Page 499). The Commission disposed of that contention then by pointing out that the par-

ties had agreed to use the space authorized as the space used, and that in respect to the loading, "that no tests were made on the lines of any of the carriers herein" (Page 137). The Commission went on to say further that "the proper count to apply, where the mail handled by any carrier or carriers continually differs from the general run can readily be ascertained by such carrier or carriers and the department and this should be done when necessary".

That certainly does not indicate that the extent of the use made of the space authorized entered into the rates of compensation fixed per unit of space, or included any sort of an allowance for a greater or a lesser number of packages actually transported on an authorization for any given unit of closed pouch service.

The *Second General Railway Mail Pay Case:* (144 I.C.C. 675, decided July 10, 1928). There are recitals (1) at page 677 that the Railway Mail Pay Committee (representing trunk roads generally) had presented evidence to show that there had been a substantial increase in the weight of mail matter carried in the various sizes of space; and (2) at pages 705, 706, that the associated short lines group had presented various exhibits comparing revenue from mail pay space with revenues with freight and passenger, one of which showed that revenues under less car load freight rates in all cases were substantially higher (on the same weights) than the mail revenues from a fully loaded three foot unit of closed pouch passenger train service. No further reference was made to (1), the increase of weight in space units, and the respondent is unable to find anything to even remotely indicate that in that general mail pay case the Commission really gave the slightest weight to the extent to which a three foot closed pouch of authorization was or was not used in fixing the rates of compensation for any of the units of space.

On the other hand, in the *Denver & Salt Lake* Case (151 I.C.C. 734, the case of the Denver & Salt Lake Railroad, a

carrier in the Rocky Mountains, and also of certain short lines in that region, the Post Office Department undertook both to (1) measure the space actually occupied and (2) count the number of packages actually handled, instead of relying upon the respective authorizations for space, but so far as is apparent in the decision, the Commission merely discarded those contentions and gave real consideration only to the amount of space authorized.

In other words, all three contentions were merely discussed and (1) the actual measurement and (2) the count of pouches, passed by in favor of the authorized space basis. In that connection the report said:

> "The carriers protest the use of either measured space or space determined upon the count basis without regard to the space authorized. They insist that the authorized basis is the only proper one because the space authorized is the space which they are obligated to furnish, regardless of how much may be carried. They also point to the fact that the space authorized in units less than 30 feet is itself based upon the number of sacks or parcels awaiting transportation; that such space, with a minimum of three feet, is determined upon the number of pieces of mail matter per 3 feet of space, the number used being the average number of pieces required to fill such space based upon the average for the country as a whole. In the instant proceeding, as in the prior one involving these same roads, the carriers contend that the average number used in determining the amount which will completely fill a three-foot unit is too large because the average size of parcel-post packages on their lines exceeds the average for the country as a whole. No separate tests were made by them to determine this, reliance being placed by them upon testimony of baggagemen, etc., and photographs of packages of parcel-post matter."
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> "As a matter of fact, none of the three services is handled in the car in that manner. In actual operation, all the matter is piled in station order, generally with no attempt to segregate it according to the services to

which it may belong and with no attempt to confine it to a specified limit of space. The measurements, however, afford some approximate check upon the relation between space assumed to be used and the space authorized. The results of each method may be compared."

Having said that, the Commission then proceeded to consider and dispose of the case on the usual space study basis without any more said to indicate any further consideration was given to the extent of the use of the authorized space in fixing the rates per unit of space.

In any event the plaintiff does not contend that the Commission cannot give due consideration to any factor in the record in this case would be relevant to a proper evaluation of the cost study, but here that is not the case. The Commission did not show any of its claimed "factors" had any weight. It simply threw the results of the cost study entirely "out of the window", and arbitrarily substituted a conclusion not supported by the evidence in this case for which it reached back and grabbed out of its decision in another case years before on different evidence.

MOULTRIE HITT.